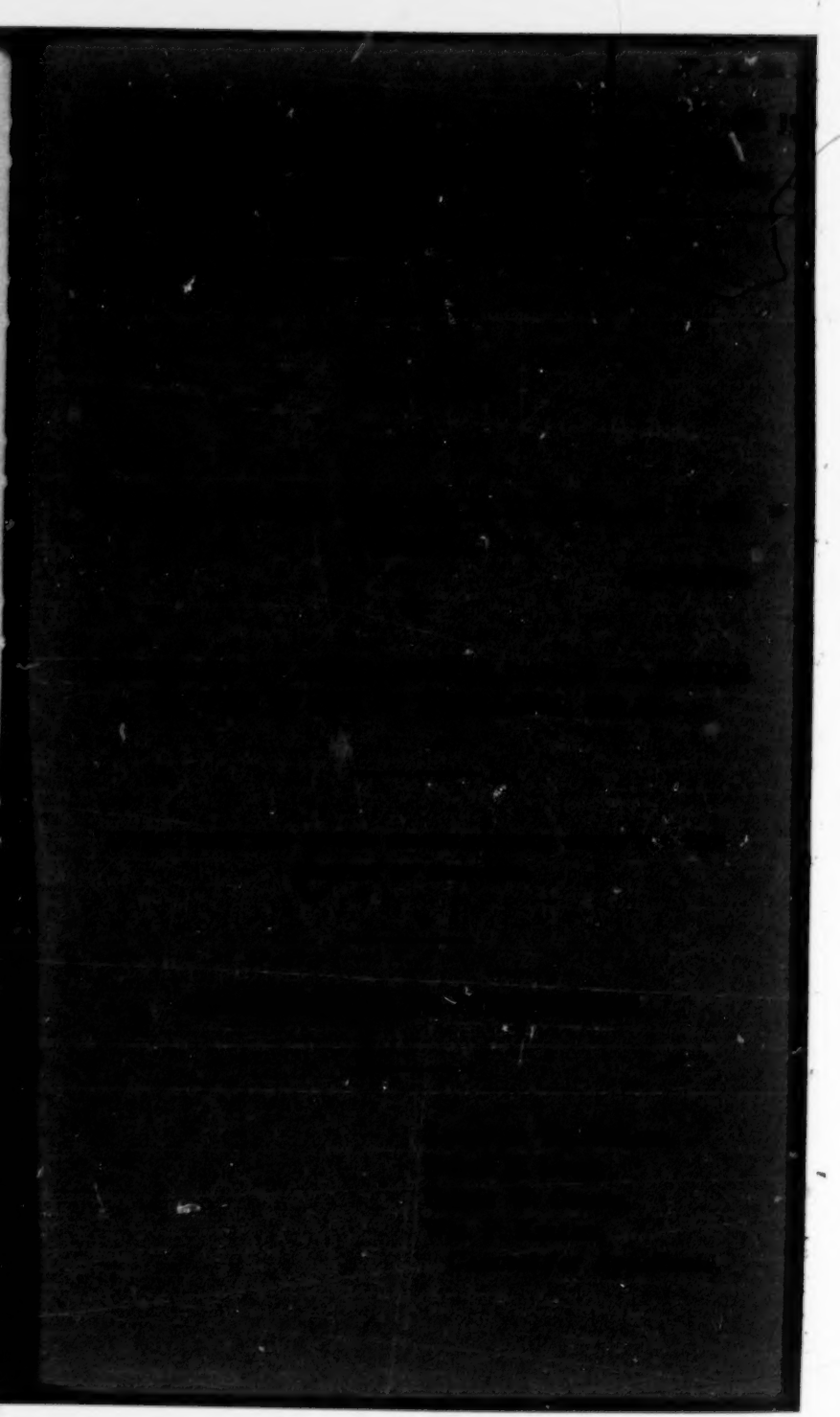

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

In Equity No. 39—5 Civil

WILLIAM PROPST, ON BEHALF OF HIMSELF AND ALL HOLDERS OF SCHOOL LAND LEASES IN THE STATE OF NEBRASKA SIMILARLY SITUATED,

Plaintiff,

vs.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, VAL PETERSON, GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE BECK, ATTORNEY GENERAL OF THE STATE OF NEBRASKA; AND HENRY H. BARTLING, SECRETARY TO THE BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA,

Defendants,

and

WILBUR E. COOLEY AND CARL OLSON,

Intervenors

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The plaintiffs and interveners-Appellants, having presented this day their petition for appeal, now file this, their statement of the basis upon which it is contended that

the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

(A) The Statutory Provisions Believed to Sustain the Jurisdiction

This appeal is prosecuted from a final order, judgment or decree which denies an injunction sought by plaintiffs and interveners against the defendants, The Board of Educational Lands and Funds of the State of Nebraska and various State officials of the State of Nebraska, and which dismisses plaintiff's and intervener's action. It was alleged in the complaint that the defendants, The Board of Educational Lands and Funds of the State of Nebraska had issued valid leases on School Lands in the State of Nebraska to approximately 2300 persons and that subsequently this Board cancelled and voided said leases, and that such action of the defendant, Board violated the contract impairment clause of Article I, Section 10 of the Constitution of the United States, and violated the due process and equal protection provisions of the Fourteenth Amendment.

The final order, judgment or decree, here appealed from, was entered in the District Court of the United States for the District of Nebraska, Lincoln Division, on December 4, 1951, by a statutory court consisting of two Circuit and one District judge, specially convoked under and by virtue of the provisions of Title 28, Sections 2281 and 2284, United States Code. It is further provided by Section 1253 of Title 28, that except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of congress to be heard

and determined by a district court of three judges; and it is further provided by Section 2101(b) of Title 28 that such appeal be taken within sixty days if the judgment, order or decree appealed from is final.

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express provisions above set forth.

(B) The State Administrative Order Which Is Involved

The plaintiffs and interveners contend that a certain administrative order, made and entered on August 13, 1951, by the Board of Educational Lands and Funds of the State of Nebraska, declaring void and of no force and effect the leases of plaintiff and interveners and all those similarly situated and declaring void and of no force and effect all orders of this Board authorizing and directing the issuance of the same, and vacating and setting aside said orders and directing the Secretary of said Board to cause said leases to be sold at public auction, and the further acts of the Board in pursuance of said order, are unconstitutional in their effect, and impair the obligation of the contracts of plaintiffs and interveners, deprives them of property without due process of law and denies to them the equal protection of the law.

The order of said Board appears in the minutes of the Board of Educational Lands and Funds, of its regular meeting of August 13, 1951, and is as follows, to-wit:

> "Moved by Decker, seconded by Pittenger that in view of the opinion of the Supreme Court of Nebraska in State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2nd 520, opinion modified in 154 Neb. 596; Todd v. Board of Educational Lands and Funds, 154 Neb. 606; Watson Hay Company v. Board of Educational Lands and Funds,

154 Neb. 613; Hanna v. Board of Educational Lands and Funds, 154 Neb. 619, and Hanna v. Board of Educational Lands and Funds, 154 Neb. 523, and pursuant to the opinion of the Attorney General dated August 13, 1951, the following described leases which were issued pursuant to that portion of Chapter 235, Laws of 1947, and Chapter 212, Laws of 1949, now designated as Sections 72-240 and 72-240.01 R. R. S., 1943, be and the same are declared void and of no force and effect and said leases and all orders of this board authorizing and directing the issues of the same are hereby vacated and set aside and the secretary of the board is hereby ordered and directed to cause the leases of the lands covered thereby to be sold at public auction by a representative of this board and that notice of such sales be given by publication as provided by law.

Motion carried.

(C) The Final Order, Judgment or Decree Sought to Be Reviewed, and the Date upon Which Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and spread of record December 4, 1951.

The petition for appeal was presented and filed on February 1st, 1952.

(D) Statement Showing That the Nature of the Case, and of the Rulings of the Court, Was Such as to Bring the Case Within the Jurisdictional Provision Relied upon.

An injunction is sought from a three-judge statutory court, to prevent the Board of Educational Lands and Funds of the State of Nebraska from treating as void some renewal leases on state school lands heretofore issued by the Board to plaintiff, to interveners and to others alleged to be in the

same class; from undertaking to offer for the term covered thereby new leases upon such lands at public auction; and from assuming to approve any bids so previously received and executing leases to any purchasers on the basis of such sale proceedings.

The alleged class, which plaintiff and interveners claim to represent, consists of approximately 2300 persons, all residents of the State, who were holders of previous leases upon separate tracts of school lands, which had expired subsequent to the effective date of Chapter 235, Neb. Laws of 1947 (or of Chapter 212 Laws of 1949, making some amendments and additions thereto, not here material) and which had been the subject of renewals issued by the Board under the provisions of that statute.

The previous expired leases had been for 25-year terms. Prior to the enactment of Chapter 235, Laws of 1947, the statute applicable to the renewal of such expiring leases, Neb. R. S. 1943, Sec. 72-240, had provided that "All lessees shall have the right, at the expiration of their contracts, to apply for and receive a new lease without a competitive bid." Another provision of the section, however, permitted third parties, if they so desired, to present bids to the Board on any such expiring leaseholds. Reading these provisions together and in the light of the history of the statute, the Nebraska Supreme Court had declared that the statute empowered the Board to make renewals of school-land leases without "the requirement of a public offering bases upon published notice;" that the Board, however, was required to receive any bids which might be presented to it in such a situation by third parties; that the holder of a previous lease thus did not have an absolute right to a renewal of his lease but a preference only; that "if the bid of the lessee was equal to that bid by any other person, the lessee's bid should be accepted, but that if a higher bid were

made by some other person, then the higher bid controlled:" and that, in substance therefore, "The lessee then has merely a right to a lease, provided no other person offers a higher bid." *State* v. *Platte Valley Public Power Dist.*, 147 Neb. 289, 23 N. W. 2d 300.

By the 1947 Act referred to, the Legislature wiped out the provision permitting third parties to present bids to the Board on lease expirations, where the holder sought renewal, and in effect granted to existing leaseholders an automatic right of renewal for a twelve-year term, subject only to the condition of their having cooperated with the Board in the proper care of the premises during their preceding term, having properly utilized the land for the purposes contemplated by the lease, having "followed the standards of soil conservation and good husbandry," and having performed all the previous lease covenants, including the payment of rent. See R. S. Supp. 1949 Par. 72-204.01.

Following the enactment of this statute, the Board refused to receive any bids from third parties, where the existing leaseholder was qualified and made application for renewal of his lease. Bids were attempted to be presented by third parties upon some of the 2300 tracts that are alleged to be here involved, and on other of such tracts inquiries were made of the Board as to whether they were open to the making of bids. The record does not establish the number of these bids and inquiries. Many of the 2300 tracts, however, including that covered by the renewal lease of plaintiff, were not made the subject of an express bid by a third party or any specific inquiry as to their openness.

This renewing of leases for twelve-year terms went on for about three years, when a case was commenced in the Nebraska courts by a third party who had presented to the Board a bonus bid for a lease upon a tract of land, the

previous term on which was then expiring, and whose bid the Board refused to receive. The Nebraska Supreme Court held in that case that the 1947 Act of the Legislature, was void as being violative of the State's Constitution. *State ex rel. Ebke* v. *Board of Educational Land and Funds,* 154 Neb. 244, 154 Neb. 596, 47 N. W. 2d 520. This holding was followed by other declarations to the same effect in *Todd* v. *Board of Educational Lands and Funds,* 154 Neb. 606, 48 N. W. 2d 706: *Watson Hay Co.* v. *Board of Educational Lands and Funds,* 154 Neb. 613, 48 N. W. 2d 711; and *Hanna* v. *Board of Educational Lands and Funds,* 154 Neb. 619, 48 N. W. 2d 715.

The Board, therefore, formally declared that all of the renewal 12 year leases were void, made vacation of all the orders under which these leases had been executed, and gave notice to the leaseholders that the lands would be offered for re-leasing at public auction.

This public-auction program has been carried into effect as fast as it has been possible for the Board to proceed. Sales of leases upon some lands, including the tracts covered by the renewal leases of the two interveners, have already been conducted. Other tracts are in process of advertising, and the remainder, including that held by plaintiff, will be similarly dealt with as soon as the Board, under the limitations of its man-power and pecuniary facilities, is able to reach them.

In the sales so far held, the previous leaseholders have in many instances been the highest bidders, their bids having been made, of course, under legal protest. In other instances, third parties have outbid the previous holders. On many tracts thus auctioned, up to the present time, bonus bids were made in excess of $1,500,000.00, in the aggregate.

Federal jurisdiction is sought to be invoked against the Board's action, on the ground that the contract-impair-

ment clause of Article I, Sec. 10, of the Federal Constitution, and the due-process and equal-protection clauses of the Fourteenth Amendment are being violated.

The case was heard and determined, and the foregoing order entered by the District Court on December 4, 1951, which said order denied the injunction sought by plaintiff and interveners and dismissed the said action.

(E) Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

The question presented to this court on this appeal is whether the order of the Board of Educational Land and Funds, and the actions and proceedings, taken by said Board in pursuance of said order, violates the Constitution of the United States, as impairing the obligation of plaintiff's and intervener's contracts and violates the due process and equal protection provisions of the United States Constitution.

It is the postition of the plaintiff and interveners that the orders and acts of the Board is in violation of the impairment-clause of the constitution, but the opinion and order or decree of the District Court does not attempt to decide this issue. The District Court held that it could not make a determination of this question, because, if there was any such impairment it was the result of judicial decision and not the legislature which impaired the contract. The lower court, therefore, has not decided whether there has been an impairment of our contract, in violation of the constitution, but has held that it had no jurisdiction to consider this question. The order made by the court does not, however dismiss this action for want of jurisdiction or sustain the motion of defendant, which was made to dismiss the action for lack of jurisdiction. On the contrary, the order of the lower court, denies the injunction, which would imply that

the question of impairment had been decided on the merits. In order, however, for this court to hold that it was the Ebke decision which impaired the contracts the court said it was bound by the state concept of the effect of an unconstitutional statute and refused to apply to the situation the federal concept. It is, therefore, apparent that the question of contract impairment has not been considered on its merits in the lower court, but such question was disposed of by saying that *if* there was a contract and *if* it had been impaired, the impairment was by judicial decision.

We contend, however, that there was a valid contract and that there was an impairment thereof in violation of the constitution and that the Ebke decision was not the thing which impaired the contract, but that it was the order and subsequent actions of the Board of Educational Land and Funds which impaired the contracts, and that such order, of said Board, is legislative in character, so as to come within the intent of the constitutional prohibition and also that the same violates the due process clause of the constitution. And that, therefore, this question is obviously substantial.

The lower court further holds, apparently upon a consideration of the merits, that there has been no violation of due process, but in so holding it adopts the position that it is bound by the state concept, that an unconstitutional statute is void ab initio and creates no new rights and abrogates no old ones. However if the lower court did attempt to dispose of the due process question upon the merits, it, therefore, must have assumed jurisdiction for this purpose, and having assumed such jurisdiction, it then was not bound by the state concept, but should have applied the federal concept, which holds that *an unconstitutional statute is not void ab initio, but that until it is declared unconstitutional, it is an operative fact and rights which have vested by contracts entered into before it is declared unconstitutional are not to be*

divested under the theory that an unconstitutional Act is a nullity ab initio and confers no rights. The question therefore is substantial.

The lower court further holds, again apparently upon a consideration of the merits, that there has been no violation of the equal protection provision of the constitution, and in so holding it says that the unconstitutional statute is *not* a nullity. The court, in holding that the class, which this plaintiff represents, is different from some other 3000 leaseholders says, "that plaintiff applied for and accepted his renewal lease under the 1947 Act, where the making of any bids, by third parties, was foreclosed", which statement is directly contrary to the prior statement that the Federal Court is bound to follow the state concept, that an unconstitutional statute is void ab initio and can create no new rights and can abrogate no old ones.

This question, therefore, is substantial.

The questions involved in this case we submit, are important and substantial from the standpoint of the money which is, and will be, involved, and the disposition of which will depend upon the final determination of the rights of the parties herein. The evidence in the lower court shows that, at the time of trial, there had been 138 tracts of land leased at public auction, under the Board's program, for which $503,303.00 had been paid at these public auctions. While the record does not disclose the amount of money paid in, subsequently, at these sales, it is a matter of common knowledge, from reports given to the press, by the Board, that this amount has now grown in excess of $1,500,000.00. This money is being transferred, by the Board, to the State Treasurer and in the event it should be determined, that the Board was without authority to cancel these leases, and offer them at public auction, a grave question will arise as to the responsibility, right or duty of the State to refund this

money to several hundred leaseholders and bidders, who have been coerced into bidding at sales, that were illegally held, and purchasing leases that cannot be delivered. It is, we submit, important, therefore, that this case be determined with utmost dispatch, to prevent this indicated situation from progressively getting more serious.

It would seem that these bidders will not be in a position to sue the State of Nebraska, even though they have paid large sums of money for leases that may not be delivered, and there is some question, whether the legislature could grant them the right to sue the state or to appropriate money for this purpose, as this conceivably, could be construed as special class legislation.

It is apparent, also that this situation is developing and encouraging hundreds of other law suits, within the state involving the rights of parties to improvements and crops, upon said lands, the value thereof, and the right to possession of said lands, under conflicting claims of right. Again the following is not disclosed, by the record, but it is a matter of common knowledge in Nebraska that many such cases are now pending and many more will be commenced, as these sales progress, and possession is demanded by the state and the successful bidders at these sales.

It is obvious, also that a speedy and final determination of this case is indicated to end the confusion and uncertainty that has, necessarily, developed. Farmers are not justified in planting and cultivating crops, with the uncertainty that they might not be afforded the opportunity of harvesting them, and securing the benefits of their labors. Cattle men are uncertain as to whether they can retain their grass land, so as to feed their herds. If their lands are taken from them, as a result of this sudden and unanticipated procedure, many will be compelled to sell animals not ready for market, and individual loss will be substantial and serious. Crops may

be neglected, because of this uncertainty of who may get the fruits of the harvest.

The State, itself of necessity, is spending large amounts of money in conducting these sales, which may accomplish nothing, if it be found that it does not have the legal right to proceed in this manner. Again, outside of the record, the Board has publicly announced, that it has about exhausted its budget and is endeavoring to devise a method of deficit spending or borrowing to carry on this program.

While much of the above and foregoing is not reflected by the record, in this case, and may not, perhaps be technically, within that which was actually contemplated, by the Supreme Court rules, we feel that it is extremely important and that we might be remiss in our duty, both to our clients, and to this court, if we failed to call it to this court's attention.

Propositions and Authorities

Until a legislative act is declared unconstitutional, such an act is an operative fact; and rights which have vested, by contracts entered into before the act is declared unconstitutional are not to be divested under the theory that an unconstitutional act is a nullity ab initio and confers no rights.

Chicot County District v. *Bank,* 308 U. S. 371;
Dougherty's Sons v. *Commissioner of Internal Revenue,* 121 F. 2d. 700;
Warring v. *Coloys,* 122 F. 2d. 642.

It has always been a recognized rule of law of the United States Supreme Court, that if the contract, when made, is valid by the laws of the State, as then expounded by all departments of its government, and administered in its courts, its validity and obligation cannot be impaired by any subsquent act of legislation or decision of its courts,

altering the construction of the law. Federal Courts are not bound by a decision of a state court in such case.

Gelpcke et al. v. *City of Dubuque*, 1 Wall. 175;
Havameyer v. *Iowa County*, 3 Wall. 294, 70 U. S. 294;
Township of Pine Grove v. *Talcott*, 19 Wall. 666;
Jefferson Branch Bank v. *Skelly*, 1 Blck. 436, 66 U. S. 436;
Ohio Life Ins. Co. v. *Debolt*, 16 How. 416;
Burgess v. *Seligman*, 107 U. S. 20;
Butz v. *City of Muscatine*, 8 Wall. 575, 75 U. S. 575;
Douglas v. *County of Pike*, 11 Otto. 677, 101 U. S. 677.

The execution and delivery of the leases, the entry into possession of the land, the payment and acceptance of rent, the employment of the land, the action of the state in recognizing the property rights of the lessees, created a property right which cannot be taken away without constitutionally impairing their contracts.

Woods v. *Lovett*, 313 U. S. 362;
Stearns v. *Minnesota*, 179 U. S. 223;
Indiana v. *Brand*, 303 U. S. 95;
Chicago v. *Sheldon*, 76 U. S. 50;
Hans v. *Louisiana*, 134 U. S. 1.

In applying the law of estoppel, the constitutionality of the act is immaterial. Resolute good faith should characterize the conduct of states in their dealing with individuals, and when acting in a proprietary capacity a state is subject to the law of estoppel as is an individual. The state's administration of school lands is proprietary and defendants are, therefore, estopped from asserting invalidity of the leases.

State v. *Horr*, 165 Minn. 1, 205 N. W. 444;
State v. *Register of State Land Office*, 193 La. 883, 192 So. 519;
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100.

The Enabling Act of Congress did not constitute a conveyance of school lands to the State in Trust, but vested the state with legal title thereto, with all ordinary incidents of other titles. And if any violation is claimed of the Enabling Act, that is for the United States Government only to complain.

Emigrant Co. v. *County of Adams,* 100 U. S. 61;
Mills County v. *Railroad Companies,* 107 U. S. 557;
State of Alabama v. *Schmidt,* 232 U. S. 168;
King County v. *Seattle School Dist.,* 263 U. S. 361.

Since the provision of the Federal Constitution against impairment of contracts was intended to forbid every mode or device having such purpose, the action of public officials in exercising their authority, if such authority makes their action equivalent to a statute, is void as impairing the obligation of contracts, if in conflict with private contract rights.

Appleby v. *Delaney,* 271 U. S. 403;
King Mfg. Co. v. *Augusta,* 277 U. S. 101.

ARGUMENT

In 1947 Nebraska enacted the statute which in substance permitted the execution of renewal school land leases to former lessees without submitting such leases to public auction, provided, however, that such old lessee had faithfully performed all the terms of the old lease and had "followed the standards of soil conservation and good husbandry." [1]

The Board executed approximately 2,300 renewal leases involved in this litigation, the lessees continued in possession, tilled the land and paid their rent.

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[1] R. S. Nebr. 1949, Section 72-204.01.

In April, 1951, the Nebraska Supreme Court held that the 1947 Act was unconstitutional insofar as it gave the right to the old lessee to a renewal lease without submitting such lease to public auction.[2]

However, the *Ebke* case is readily distinguishable from the case at bar.

(a.) There never had been a lease executed or delivered in the *Ebke* case. In the case at bar, formal leases were executed, delivered and acted upon.

(b.) There was a bonus bid submitted in the *Ebke* case, and therefore, the lease required submission at public auction under the old law if the new law was unconstitutional. In the case at bar, by stipulation it was established that there was no bonus bid submitted on the plaintiff's lease, and no bonus bids on many, if not most of the other leases in the same class. Therefore, under the old law such leases were not required to be sold at public auction.

(c.) The *Platte Valley* case,[3] which is still the law of Nebraska, held that it was not necessary to submit a lease to public auction unless a bonus bid was submitted by a third party.

(d.) The *O'Brien* case, which is still the law of Nebraska, held that once a school land lease had been executed and delivered, the State could not rescind such lease, even if the State had an opportunity to get more money by cancelling such lease and re-issuing it to another.[4]

We say, therefore, that neither the *Ebke* case nor any of the subsequent cases had anything whatsoever to do with leases which had already been executed and delivered. In

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[2] *Ebke* v. *Board of Educational Lands and Funds*, 154 Nebr. 244, 47 N.W. 2nd 520.

[3] *State* v. *Platte Valley Public Power and Irrigation District*, 147 Nebr. 289, 23 N.W. 2nd, 300, 166 A.L.R. 1196.

[4] *State ex rel. O'Brien* v. *Board of Commissioners of Educational Lands and Funds*, 116 Nebr. 261, 261 N.W. 818.

none of the cases did the Court, even by way of dictum, suggest that the leases which had already been executed and delivered and the rent paid thereon and improvements made on the land, should be cancelled.

The Board even exercised its judgment on policy procedure by determining that the 12 year leases be cancelled, but that the 25 year leases issued under the 1943 Act be permitted to stand, although in most of the 25 year leases there had been no bonus bids submitted and no public auctions held. Many of the 25 year leases, executed as late as 1946, at private sale without bonus bids or public auction, extended in duration beyond the term of the 12 year leases which were cancelled.

The cancellation of existing leases was solely the idea and interpretation of the Board of Educational Lands and Funds. We submit that it was the action of the Board in cancelling the leases, holding new sales, and threatening to evict the lessees, which impaired the contracts then in existence. The Board was acting in a legislative capacity as agent for the legislature in managing the school lands. It was therefore the Board's action, and not the judicial decision in the *Ebke* case, which impaired the contracts.

A

Impairment of Contract

The Federal Courts jealously reserve the right to make an independent analysis of the law and facts where it is contended that rights guaranteed by the Federal Constitution have been violated.[5] The Federal Courts are not bound by the State Court's interpretation as to the exist-

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[5] *Gelpcke et al.* v. *The City of Dubuque*, 1 Wall. 175; *Butz* v. *City of Muscatine*, 8 Wall. 575, *Douglas* v. *County of Pike*, 101 U.S. 677, *Ohio Life and Trust Co.* v. *Debolt*, 16 How. 416, *Anderson* v. *Santa Ana*, 116 U.S. 356, *German Savings Bank* v. *Franklin County*, 128 U.S. 526.

ence or non-existence of contract rights which have accrued under a state statute which is subsequently declared unconstitutional.[6]

The federal concept is that contract rights may be impaired by action of a state administrative board as well as by the legislature,[7] and also that contract rights may be impaired by judicial decision under certain circumstances.[8]

The learned three-judge court took jurisdiction and tried the case on its merits, at least for the purpose of deciding whether the Board's actions had deprived the plaintiff and intervenors of equal protection of the law.[9]

We contend that, having taken jurisdiction on the basis of any federal question involved, the Federal Court should have applied the federal concept and made an independent analysis of the claimed contract rights of the plaintiff and intervenors, rather than being bound by the state concept that a person cannot under any circumstances acquire rights under a statute which is subsequently declared unconstitutional.[10]

The learned Court relied solely on the authority of *Tidal Oil Co.* v. *Flanagan*,[11] and other cases cited on Page 5 of the Memorandum Opinion.

We submit that the *Tidal Oil Co.* case is not in point with the case at bar for the following reasons:

(a.) The *Tidal Oil Company* case and others cited are all cases where the United States Supreme Court reviewed the case on writ of error from the state courts. The case at

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[6] *Chicot County Drainage District* v. *Bank*, 308 U.S. 371; *Wright* v. *Nagle*, 101 U.S. 791; *Jefferson Branch Bank* v. *Skelly*, 1 Black 436 and 433.

[7] *Northern Ohio Traction Co.* v. *Ohio*, 245 U.S. 574.

[8] *Butz* v. *Muscatine*, 75 U.S. 575; *Chicago* v. *Sheldon*, 76 U.S. 50.

[9] Page 9 of Memorandum Opinion.

[10] Page 6 of Memorandum Opinion.

[11] 263 U.S. 444.

bar is not here on writ of error, but on direct appeal from a case originating in Federal Court. The *Tidal Oil Co.* case itself makes this distinction. Speaking of the cases of *Gelpcke* v. *Dubuque, Butz* v. *Muscatine,* and *Douglas* v. *County of Pike* and other similar cases, the Court said:[12]

> "Had such cases been decided by the state courts, however, and had it been attempted to bring them here by writ of error to the State Supreme Court, they would have presented no federal question, and this Court must have dismissed the writs for lack both of power and jurisdiction. This is well illustrated by the cases of Gelpcke v. Dubuque, 1 Wall. 175 and Railroad Co. v. McClure, 10 Wall. 511. In the former bonds sued on in the Circuit Court of the United States, were collected under judgment of this Court. In the latter, like bonds sued on in a state court were held invalid, and a writ of error to the State Supreme Court was dismissed."

It therefore appears that the Court applies a different rule of law when a case is presented on writ of error from state courts than when a case originates in Federal Courts on Federal Constitutional questions. Again in *Brinkerhoff-Ferris Trust Co.* v. *Hill,* 281 U.S. 673 (Page 681), the doctrine of *Gelpcke* v. *Dubuque* is confined to cases arising in Federal Court.

While the reason for such distinction is not immediately apparent to us, nevertheless the distinction has been made and followed. It would appear to us that the United States Supreme Court should always have the right of an independent analysis in substantial questions on impairment of contract.

Our case originated in Federal Court, and therefore, the three-judge Court should have followed the rule laid down

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[12] 263 U.S. 452.

in *Gelpcke* v. *Dubuque*, rather than the rule in writ of error cases such as *Tidal Oil Co.* v. *Flanagan*.

(b.) Our case is further distinguishable from the *Tidal Oil* case because that case involved a decision of the state court in the same litigation between the appellant and appellee or their privies. In other words, the judgment which it was claimed impaired the contract was simply a change in judicial decisions in litigation between the same parties or their privies. The language of the *Flanagan* case [13] is as follows:

> "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such a case, the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law."

The judgment of the state court appealed from was the judicial decision which it was claimed impaired the contract. We think that in the *Flanagan* case the United States Supreme Court properly and logically declined to invoke the contract impairment clause for the purpose of taking jurisdiction.

Any other course would require the United States Supreme Court to review every decision of a state court which involved contract rights. We have no quarrel with the *Tidal Oil* case, but simply say it is not in point.

In our case we are not before the Court on writ of error. We were never parties to any litigation in state court involving these leases, which had already been executed and delivered. Our state court has never determined that leases already executed, delivered and acted upon should be cancelled. We are not concerned in this appeal with

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[13] 263 U.S. 50.

the correctness or incorrectness of the judicial decision in the *Ebke* case. We say only that the interpretation and action taken by the Board of Educational Lands and Funds after the *Ebke* case and other cases impaired the contract rights. We say that rights vested while the Attorney General of Nebraska and the Board and everyone else in Nebraska believed the 1947 Act was constitutional. These vested rights cannot be swept away by the action of the Board. In *Chicot County District* v. *Bank* [14] the Court said:

> "The determination of unconstitutionality did not make the act a blank page in retrospect, as the appellants urge. Under it, actions have been taken by the school district, as the bill discloses, which were operative facts that must be recognized at least so far as the question whether the board acted by or pursuant to a law of the state is concerned."

The point was also urged vigorously to the three-judge Court that these lessees had acquired vested rights which could not be taken away even if the 1947 Act were unconstitutional.

An unconstitutional statute which purports to amend or repeal an original act can have no effect, and the original act remains in full force and effect.[15]

Under the old 1943 Act, a lessee was entitled to a renewal lease unless some other person submitted a bonus bid, in which event the lease must be sold at public auction. By stipulation it was established that there was no bonus bid submitted at the time the plaintiff's renewal lease was executed and delivered. He would therefore have a valid lease under the 1943 Act which was the governing statute

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[14] 308 U.S. 371.

[15] *Frost* v. *Corp. Commission*, 278 U.S. 515; *Waters-Pierce Oil Co.* v. *Texas*, 177 U.S. 28; *State ex rel. Baldwin* v. *Strain*, 152 Nebr. 763, 42 N.W. 796.

once the 1947 amendment was held unconstitutional, and was the law all the intervening time under the Nebraska concept that an unconstitutional statute is a nullity *ab initio.*

Our Court had held that a valid lease existed under the 1943 Act if there was a private sale in a case where no bonus bid had been submitted.[16] Our Court held:

> "We think it clear from analysis of the act and its history that the 'without a competitive bid' waives the requirement of a public offering based upon published notice. Clearly the section does not give the lessee an absolute right to a new lease. He is entitled to that lease provided some other person does not bid more for a lease than does the lessee and in the event of a higher bid, by a third person, the lessee is not entitled to a lease for a new term. The lessee then has merely a right to a lease, provided no other person offers a higher bid. The securing of a new lease does not depend alone upon the action of the lessee and the state. It depends upon whether or not some third person, at the expiration of the lease, makes a higher bid than that of the lessee."

The three-judge court took jurisdiction to decide this issue on the merits because the Court decided that the plaintiff and others in his class had no rights under the old law since third parties were deprived of the "opportunity to bid". Again the Court took jurisdiction on the merits to decide what rights, if any, the plaintiffs and others had under the former law, but having taken jurisdiction, they failed to apply the federal concept.

There is a long list of cases that hold that the law of the state as then interpreted constitutes a part of the contract and to make the constitutional prohibition effec-

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[16] *State of Nebraska* v. *Platte Valley Public Power District,* 147 Nebr. 289, 23 N.W. 2nd 300.

tive, the Federal Courts must exercise an independent judgment in deciding as to the validity and construction of the law and to the existence and terms of the contract.[17] This is also the law of Nebraska. In the case of *Todd* v. *Board of Educational Lands and Funds*[18] our Court said:

> "The law on the subject *in force at the time of the execution of the lease* is a part thereof and determines the rights of the lessee."

In the case of *Havermeyer* v. *Iowa County*,[19] the United States Supreme Court extended this doctrine to cases where there had been no judicial determination, but the state officials had considered the action constitutional. The Court said:

> "Prior to the decision holding the act invalid no intimation had been given, by any department of the government, that such statutes were invalid. The subsequent adjudication of the supreme court of the state held the act invalid. But being posterior to the time when the securities were issued, such decision can have no effect upon our decision and may be laid out of view. We can look only to the condition of things which subsisted when the bonds were sold. That brings them within the rule laid down by the court in Gelpcke v. The City of Dubuque. In that case it was held that, if the contract, when made, was valid by the constitution and the laws of the state, as then expounded by the highest authorities, whose duty it was to administer them, no subsequent action of the legislature or judiciary can impair its obligation."

In the case at bar, the Governor, the Attorney General and the Board had all assumed the act was constitutional.

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[17] *Jefferson Branch Bank* v. *Skelly*, 1 Black 436, 443; *Wright* v. *Nagle*, 101 U.S. 791, 793.

[18] 154 Nebr. 606, 48 N.W. 2nd 706.

[19] 70 U.S. 294.

It was their duty to raise an objection if there were any doubt as to the constitutionality of the 1947 Act. They proceeded on the theory that the Act was valid, executed and delivered leases, collected rent and encouraged lessees to improve the land with the expectation that their efforts would be rewarded in subsequent years. Even in the *Ebke* case, the Attorney General and the Board defended vigorously the constitutionality of the Act which they now say gave the lessees no rights whatsoever.

In passing, the Court's attention should be invited also to *Section 72-101 R. S. Nebr. 1943*, which reads as follows:

> "In cases in which contracts for sale or lease of lands owned by the state have been duly signed, executed and delivered to the purchaser or purchasers or lessees named in such contracts, by the proper state officers, the omission on the part of the proper officers to have first offered such lands at public sale shall not invalidate the private sales or leasing of such lands; but the purchaser or purchasers or lessees in such contracts mentioned, or their assignees, upon performance by them of the covenants and conditions on their part, by the terms of such contracts to be done, kept and performed, shall be entitled to a deed or contract of sale from the state for such lands; and the proper officers of the state in such cases are authorized and directed to make, execute and deliver to such purchaser, or purchasers or lessees, or their assignees, deeds or contracts of sale from the state, which deeds, when properly executed and delivered, shall convey all right, title and interest of the state in and to the lands described therein."

The Board, however, solely on its own initiative, chose to ignore this section of the statute, and notwithstanding its provisions, attempt to cancel existing leases. There has never been a decision of the state court holding this act unconstitutional. The refusal, therefore, to comply with

the plain statutory language was solely the responsibility of the defendant Board.

B

Equal Protection of the Law

The Board chose to so interpret the *Ebke* case as a mandate to cancel the 12 year leases. The *Ebke* case had held that it was a violation of the trustee's duty to give a preferential right to any persons by granting them a lease without bonus bids and public auction. The Board, however, chose to leave undisturbed 25 year leases which were executed at private sale without bonus bids or public auction. This distinction made by the Board was an administrative and legislative act. This distinction made by the Board is established by stipulation. We submit that if the trustee violated his duty by granting a 12 year lease without bonus bids and public auction, then by the same token, the trustee violated the same duty by executing a 25 year lease at private sale.

C

Due Process

The learned three judge Court held that it was the Ebke decision and not the action of the Board which impaired the contract rights. Yet the plaintiff and others in his class were not parties to any of the litigation. None of the litigation in the other cases had ever involved the validity of a lease which had been executed and delivered. If it were the *Ebke* case which impaired our contract, and we were not parties to the *Ebke* case, then we have not had our day in Court.

It was not alone the stroke of the pen made at the time the Board passed a resolution cancelling the leases that deprived the plaintiff of due process. It was their subse-

quent action in holding public auctions on the same land, their threats to evict the present tenants and their promises at the public auction to give the new purchaser possession on January 1, 1952.

D

Estoppel of the State to Deny the Validity of Such Leases

The Board, of which the Governor and Attorney General were members, had issued formal leases. For a four year period, the State, had accepted the rental. The lessees had paid taxes on the value of such leases. The State had encouraged the lessees to "summer till" the land, and make improvements thereon. In the *Ebke* case the Attorney General and the Board defended the constitutionality of the 1947 Act. The Board had recognized the validity of such leases by ratifying assignments of the leases. The Board accepted and still retains one-half of the consideration paid for the assignment of such leases.

In short, until August of 1951, everyone in the State of Nebraska assumed that such leases were valid. The State having accepted the benefits of the contract, cannot now repudiate the leases and still retain the benefits of such leases.

In managing the school lands, the State acted in a proprietary rather than governmental capacity. In the case of *Todd* v. *Board of Eduational Lands and Funds*,[20] our Court said:

> "This is true of a lease made by the state. It, by entering into a contract, abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does when he makes a contract. The state may not impair any of the substantial rights secured by its contract to a citizen with whom it contracts."

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[20] 154 Nebr. 606, 48 N.W. 2nd 706.

When acting in a proprietary capacity, the doctrine of estoppel is applicable against the state.[21] Many other authorities could be cited, particularly on the impairment of contract issue. It is believed, however, that the foregoing discussion is sufficient to establish the fact that there are involved substantial federal questions, and that substantial federal authorities sustain the plaintiff's and intervenors' position in this litigation.

F

Cases Believed to Sustain the Jurisdiction

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree here in question:

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290;
Pendergast v. *New York Telephone Co.*, 262 U. S. 43;
Jameson & Co. v. *Morgenthau*, 307 U. S. 171;
Stratton v. *St. Louis & Southwestern R. Co.*, 282 U. S. 10;
Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133;
Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151;
West v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662;
Railroad Commission v. *Pacific Gas Co.*, 302 U. S. 388.

G

Statement Respecting Opinions

The Court below delivered a written opinion, a copy of which is reproduced as Appendix A and attached to this

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[21] *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100.

jurisdictional statement. The opinion denying plaintiff's and intervenors' Motion for Preliminary Injunction is attached hereto and marked Exhibit B.

Respectfully submitted,

JAMES J. FITZGERALD,
BRUCE K. LYON,
HENRY W. CURTIS,
WM. P. KELLEY,
Attorneys for Appellants.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

In Equity

No. 39-51 Civil

WILLIAM PROPST, on behalf of himself and all holders of School Land Leases in the State of Nebraska similarly situated, *Plaintiff*,

vs.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS of the State of Nebraska; VAL PETERSON, Governor of the State of Nebraska; CLARENCE BECK, Attorney General of the State of Nebraska; and HENRY H. BARTLING, Secretary to the Board of Educational Lands and Funds of the State of Nebraska, *Defendants*,

and

WILBUR E. COOLEY and CARL OLSON, *Interveners*

ORDER

Pursuant to the Memorandum Opinion filed herein,

It is ordered that the injunction sought by plaintiff and interveners be denied and that the action be and hereby is dismissed, at plaintiff's and interveners' costs.

December 4, 1951.

By the Court:

(S.) JOSEPH W. WOODROUGH,
Circuit Judge.

(S.) HARVEY M. JOHNSEN,
Circuit Judge.

(S.) J. A. DONOHOE.
District Judge.

Filed
District of Nebraska
at 10:30 A.M. #21
Dec. 4, 1951
Mary A. Mullen Clerk

By MAM
A True Copy
Attest:

MARY A. MULLEN,
Clerk.
By (S.) CARL H. WORLEY,
Deputy.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

In Equity

No. 39-51 Civil

WILLIAM PROPST, on behalf of himself and all holders of School Land Leases in the State of Nebraska similarly situated, *Plaintiff*,

vs.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS of the State of Nebraska; VAL PETERSON, Governor of the State of Nebraska; CLARENCE BECK, Attorney General of the State of Nebraska; and HENRY H. BARTLING, Secretary to the Board of Educational Lands and Funds of the State of Nebraska, *Defendants*,

and

WILBUR E. COOLEY and CARL OLSON, *Interveners*

MEMORANDUM OPINION

Before WOODROUGH and JOHNSEN, Circuit Judges, and DONOHOE, District Judge

JOHNSEN, *Circuit Judge:*

An injunction is sought from a three-judge statutory court, to prevent the Board of Educational Lands and Funds

of the State of Nebraska from treating as void some renewal leases on state school lands heretofore issued by the Board to plaintiff, to interveners and to others alleged to be in the same class; from undertaking to offer for the term covered thereby new leases upon such lands at public auction; and from assuming to approve any bids so previously received and executing leases to any purchasers on the basis of such sale proceedings.

The alleged class, which plaintiff and interveners claim to represent, consists of approximately 2300 persons, all residents of the State, who were holders of previous leases upon separate tracts of school lands, which had expired subsequent to the effective date of Chapter 235, Neb. Laws of 1947 (or of Chapter 212, Laws of 1949, making some amendments and additions thereto, not here material) and which had been the subject of renewals issued by the Board under the provisions of that statute.

The previous expired leases had been for 25-year terms. Prior to the enactment of Chapter 235, Laws of 1947, the statute applicable to the renewal of such expiring leases, Neb. R. S. 1943, § 72-240, had provided that "All lessees shall have the right, at the expiration of their contracts, to apply for and receive a new lease without a competitive bid." Another provision of the section, however, permitted third parties, if they so desired, to present bids to the Board on any such expiring leaseholds. Reading these provisions together and in the light of the history of the statute, the Nebraska Supreme Court had declared that the statute empowered the Board to make renewals of school-land leases without "the requirement of a public offering based upon published notice;" that the Board, however, was required to receive any bids which might be presented to it in such a situation by third parties; that the holder of a previous lease thus did not have an absolute right to a renewal of his lease but a preference only; that "if the bid of the lessee was equal to that bid by any other person, the lessee's bid should be accepted, but that if a higher bid were made by some other person, then the higher bid controlled;" and that, in substance therefore, "The lessee then has merely a right to a lease, provided no other person offers a higher bid."

State v. Platte Valley Public Power Dist., 147 Neb. 289, 23 N. W. 2d 300.

By the 1947 Act referred to, the Legislature wiped out the provision permitting third parties to present bids to the Board on lease expirations, where the holder sought renewal, and in effect granted to existing leaseholders an automatic right of renewal for a twelve-year term, subject only to the condition of their having cooperated with the Board in the proper care of the premises during their preceding term, having properly utilized the land for the purposes contemplated by the lease, having "followed the standards of soil conservation and good husbandry," and having faithfully performed all the previous lease covenants, including the payment of rent. See R. S. Supp. 1949, § 72-204.01.

Following the enactment of this statute, the Board refused to receive any bids from third parties, where the existing leaseholder was qualified and made application for renewal of his lease. Bids were attempted to be presented by third parties upon some of the 2300 tracts that are alleged to be here involved, and on other of such tracts inquiries were made of the Board as to whether they were open to the making of bids. The record does not establish the number of these bids and inquiries but it does suggest that they were substantial. Many of the 2300 tracts, however, including that covered by the renewal lease of plaintiff, were not made the subject of an express bid by a third party or of any specific inquiry as to their openness.

This automatic renewing of leases for twelve-year terms under the 1947 Act went on for about three years, when it was challenged in the Nebraska courts by a third party who had presented to the Board a bonus bid for a lease upon a tract of land, the previous term on which was then expiring, and whose bid the Board refused to receive. The Nebraska Supreme Court held in that case that the 1947 Act of the Legislature, in giving previous leaseholders a special benefit in the school lands in the form of an automatic renewal right, without regard to how much or whether others were willing to pay more, was void as being violative of the State's Constitution. State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 154 Neb. 596, 47 N. W.

2d 520. This holding was followed by other declarations to the same effect in Todd v. Board of Educational Lands and Funds, 154 Neb. 606, 48 N. W. 2d 706; Watson Hay Co. v. Board of Educational Lands and Funds, 154 Neb. 613, 48 N. W. 2d 711; and Hanna v. Board of Educational Lands and Funds, 154 Neb. 619, 48 N. W. 2d 715.

The effect of these decisions, and of the Ebke case in particular, was to leave the Board with the indicated obligation, in the situation which the invalid statute had produced, of putting the lands up for re-leasing at public auction. In recognition of its trust responsibility so pointed out, and basing its action entirely, as its minutes show, upon what the Supreme Court had held, the Board formally declared that all of the renewal leases issued by it under the 1947 Act were void, made vacation of all the orders under which these leases had been executed, and gave notice to the leaseholders that the lands would be offered for re-leasing at public auction.

This public-auction program has been carried into effect as fast as it has been possible for the Board to proceed. Sales of leases upon some lands, including the tracts covered by the renewal leases of the two interveners, have already been conducted. Other tracts are in process of advertising, and the remainder, including that held by plaintiff, will be similarly dealt with as soon as the Board, under the limitations of its man-power and pecuniary facilities, is able to reach them.

In the sales so far held, the previous leaseholders have in many instances been the highest bidders—their bids having been made, of course, under purported legal protest. In other instances, third parties have outbid the previous holders. On 138 tracts thus auctioned during the first month of the Board's releasing operations, it is shown that bonus bids were made of $503,303, above the amount which would have been received in rental and in revenue for the school system of the State from the renewal leases issued under the 1947 Act.

Federal jurisdiction is sought to be invoked against the Board's actions, on the ground that the contract-impairment clause of Art. I, Sec. 10, of the Federal Constitution,

and the due-process and equal-protection clauses of the Fourteenth Amendment, are being violated.

It must be kept in mind that Art. I, Sec. 10, of the Constitution is a prohibition only against the impairing of contract obligation by legislation. Such impairment as may be produced by judicial decision alone is not within its ban. Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L. Ed. 392; Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L. Ed. 547; People's Banking Co. v. Sterling, 300 U. S. 175, 57 S. Ct. 386, 81 L. Ed. 586; Morton v. Dardanelle Special School District No. 15, 8 Cir., 121 F. 2d 423, 424; 12 Am. Jur. 26, § 398. See also 57 Harv. L. R. 582.

Here it is, of course, not the Legislature which has attempted to affect the rights which plaintiff and interveners contend have become vested in them by their renewal leases. To the contrary, what the Legislature has done is itself the basis of their claimed rights. Equally, it is not any exercise of legislative power and function by an administrative board or agency which has given the renewal leases their status of illegality under state law. That status derives not from the Board's declaration of invalidity and vacating of its orders for issuance of the leases but from the stamp of nullity placed upon the 1947 Act, and so upon the things which it granted, by the pronouncement of the Supreme Court in the Ebke case. The Board's declaration and vacating of orders, as its minutes show, did not purport to represent action taken by it on the basis of any power which it claimed to possess to revoke or disrupt leases but was simply a formal recognition of the effect which the Ebke case had had and an attempt to clear from its records the legal debris which that decision had left.

When the 1947 Act was declared unconstitutional by the Court, the alleged rights of plaintiff and interveners granted by, applied for and accepted by them under the Act as automatically fell as they had been given. Under Nebraska law, an unconstitutional statute is an utter nullity, is void from the date of its enactment, and is incapable of creating any rights. See Finders v. Bodle, 58 Neb. 57, 78 N.W. 480; Central National Bank of Lincoln v. Sutherland, 113 Neb. 126, 202 N.W. 428.

Since rights purporting to be granted by such a statute are not recognized by the law of that State as ever having had an existence, they cannot, of course, be the subject of any impairment on the basis of state constitutional concept. As plaintiff and interveners contend, that concept, however, is not necessarily controlling on a question of impairment in relation to the Federal Constitution. But whether or not the alleged rights here would be capable in a proper situation of being regarded as of sufficient reality and substance to entitle them, notwithstanding state concept, to recognition and protection against impairment on the basis of federal constitutional appraisal does not matter here. Such a contract appraisal is only able to be made in a situation where the Constitution permits the contract-impairment clause to be invoked. And, as we have pointed out, under the authorities previously cited, alleged contract rights are not subject to scrutiny or testing by a federal court in relation to the question of their impairment as obligations, except where some legislative interposition has occurred aganst them. In the present situation, as we have said, it is the judicial finger and not the legislative hand by which plaintiff's and interveners' leases have been legally touched. No jurisdiction therefore exists in a federal court to make any examination or evaluation of their alleged rights as a question of impairment of contract obligation.

Some attempt is made to argue that the Ebke case does not mean that all the renewal leases issued under the 1947 Act are ipso facto invalid but only those in situations where a bonus bid was actually offered to the Board by a third party. We are unable so to read the Court's opinion. Plainly, it was declared that it was unconstitutional for the Legislature to undertake to give the previous leaseholders a renewal right which prevented the Board from receiving bids from third parties. This the 1947 Act specifically did. Plaintiff's and interveners' leases, as well as those of all other parties whom they can properly claim to represent, were admittedly applied for and accepted on that basis. In the legal muddle which has resulted, obviously no one can tell what bids from third parties would

otherwise have been received, nor is there any way under the statutes to clear the legal atmosphere and to do justice to the school system and to interested parties except to place the lands up for leasing at public auction, as the Supreme Court, on rehearing, directed be done in the Ebke case.

Whether the Supreme Court's mandate of public auction was intended to apply generally to all expirations of leaseholds thereafter, and so to depart from the procedure given recognition in the Platte Valley Public Power District case, supra, or whether it is merely one of exigency for the situation created by the 1947 Act, is of no moment here. Whatever was the intention and whatever might be the effect in relation to such renewal rights as plaintiff and interveners might have had, under the statutes and the Platte Valley Public Power District decision, prior to the 1947 Act, the results in either event are products of judicial decision alone and therefore are not the kind of impairment, if such they can at all be called, which is within the protection of Art. I, Sec. 10, of the Federal Constitution.

The other questions which have been presented do not appear to be matters on which technically the parties are entitled to the consideration of a three-judge statutory court. They have been submitted to us, however, without any objection that they more properly are single-judge considerations, and we shall therefore in the interest of expedition make disposal of them.

It is contended that the due process requirement of the Fourteenth Amendment has been violated by the actions of the Board in declaring the renewal leases void and in vacating its orders of issuance, without previous notice to plaintiff and interveners and an opportunity to them to be heard. But, as we have emphasized, it was the decision of the Supreme Court in the Ebke case which gave to the renewal leases their status of legal nullity and not the Board's echoing and reflecting of this lifelessness upon its record by its declaration and its vacating of the previous issuance orders. Notice by the Board to plaintiff and interveners and the allowing of opportunity to them to be

heard, before the formality of declaration and vacating of issuance orders was engaged in by the Board, could in no way have affected the status of legal nullity which the Ebke case had created or have removed from plaintiff's and interveners' renewal leases the stamp of illegality which had been thus placed upon them. What the Board did could not violate rights unless rights existed. And except as rights existed and were touched, no question of due process could possibly be involved in relation to the Board's actions. Within the argument here made, therefore, no violation of due process under the Fourteenth Amendment has occurred.

The further contention has been made that plaintiff and interveners are being denied equal protection of the law, in that they are being subjected to the requirement of public auction, whereas some 3,000 renewal leases on other school lands which had been previously issued without auction proceedings, under the statutes in force prior to the 1947 Act and within the recognition made by the Platte Valley Public Power District case, are admittedly being allowed to stand. It has been stipulated that there is no intention to subject these previous renewal leases, made for 25-year terms under the old statutes, to re-leasing proceedings through public auction, as being void.

But the distinction between the situation of persons holding renewal leases under the statutes in force prior to 1947, where the opportunity had been afforded for the presenting of bids by third parties, and of those who applied for and accepted renewal leases under the 1947 Act, where the making of any bids by third parties was foreclosed, is on its face sufficient, without regard to any other consideration, to allow the State to treat them as different classes, if it chooses to do so, in so far as any violation of the equal protection clause of the Fourteenth Amendment is concerned. It was because the 1947 Act had closed the door to the receiving of outside bids in any manner whatsoever that the Supreme Court of Nebraska struck it down, that those who had accepted renewals on the basis of that statute therefore were left without any lease contracts under it, and that public auction has been made necessary in plaintiff and interveners' situation.

Other minor contentions have been made which are wholly without any basis, as present claims of federal constitutional violation at least, and so afford no ground for any invocaton of federal court jurisdiction in this proceeding.

An attempt has been made by plaintiff and interveners to represent and seek injunctive relief for some 79 persons out of the 2300 renewal leaseholders under the 1947 Act, who have become assignees of renewal leases under approval of the Board, through payment to the State of one-half of the consideration paid to the renewal leaseholder, pursuant to the provisions of R. S. Supp. 1949, § 72-234.02. But plaintiff and interveners cannot in a class action represent any rights of others which go beyond their own. They can only give to others through representation the benefit of such rights as they are able to establish in their own situation. If any contract rights from estoppel or otherwise can exist in favor of the 79 persons referred to, by virtue of R. S. Supp. 1949, § 72-234.02, beyond the situation of plaintiff and interveners, which has been discussed above, they are not before us and we make no consideration of them.

On the basis of what has been said, plaintiff and interveners are not entitled to an injunction from a federal court as sought, and their action is dismised, with allowance of costs against them.

Filed District of Nebraska at 10:30 A.M. #20 Dec. 4, 1951. Mary A. Mullen Clerk, by MAM.

A true copy
Attest: Mary A. Mullen, Clerk.
By (S.) Carl H. Worley,
Deputy.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION

In Equity. No. 39-51 Civil

WILLIAM PROPST, on Behalf of Himself and All Holders of School Land Leases in the State of Nebraska Similarly Situated, *Plaintiff*,

v.

THE BOARD OF EDUCATIONAL LANDS and FUNDS OF THE STATE OF NEBRASKA; VAL PETERSON, Governor of the State of Nebraska; CLARENCE BECK, Attorney General of the State of Nebraska; and HENRY H. BARTLING, Secretary to the Board of Educational Lands and Funds of the State of Nebraska, *Defendants*,

and

WILBER E. COOLEY and CARL OLSON, *Interveners*

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND ON MOTION TO DISMISS, ETC.

This cause was submitted on the motions of plaintiff and interveners for preliminary injunction, the exhibits in support thereof and arguments of counsel, on October 4 and 5, 1951, and it appearing that the defendant Board will unless restrained take action on October 8, 1951, as stated in the motions, which action is sought to be restrained, the court declares its decision before that time as follows:

It finds that since the decision of the Supreme Court of Nebraska in State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520; Todd v. Board of Educational Lands and Funds, 154 Neb. 606, 48 N. W. 2d 706; Watson Hay Co. v. Board, 154 Neb. 613, 48 N. W. 2d 711, and Hanna v. Board, 154 Neb. 619, 48 N. W. 2d 714, the defendant Board has taken steps to discontinue the leasing of the educational lands in accordance with the portions of Chapter 235, Laws 1947, and Chapter 212, Laws

1949, now designated as § 72-240 and 72-240.01 R. R. S. 1943, which the Supreme Court held were violative of Article VII, Section 9 Constitution of Nebraska, and were to the special benefit of existing lessees desiring to continue as such and were arbitrarily and unreasonably detrimental to the trust in respect to the school lands and invalid.

The steps which the defendant Board is shown to have taken to conform the execution of its trust to the law as declared by the State Supreme Court and to good conscience are not shown to have been arbitrary or such as to deprive holders of school leases of any rights without due process of law or to impair the obligation of such contracts as there may have been, but, on the contrary, are appropriate and suitable steps to carry out the Board's trust in respect to the school lands and to afford the plaintiff class of lessees of school lands opportunity to assert and to be heard in the courts of the State and if need be in the Supreme Court of the United States in respect to any rights they claim to have. The defendant Board has not interfered with the possession of the school lands and does not threaten to do so except as due process of law may be ultimately resorted to in execution of the school land trust.

That the defendant Board will unless restrained reoffer the school lands for lease and will execute new leases to higher bidders does not afford grounds for the issuance of temporary injunction by the federal court. Such action on the part of the Board will not deprive the plaintiff class of lessees of the use and possession of the land or cause them irreparable injury. That the action of the Board may require lessees within the plaintiff's class to elect whether they will or will not pay rental more nearly commensurate with the value of the lands, or whether they will stand on the right they assert under the Act of 1947, does not deprive them of due process nor constitute an impairment of the obligation of their contracts. Since some procedure is necessary to conform the leasing of school lands by the Board to the trust obligations in respect thereto, to the procedure adopted does not threaten imminent or irreparable injury to the plaintiff's class of lessees.

Temporary injunction is denied.

Ruling on the motion of defendants to dismiss is reserved and they may plead subject to their motion.

The action will stand for hearing on the merits.

By the Court:

JOSEPH W. WOODROUGH,
Circuit Judge;

HARVEY M. JOHNSEN,
(I Concur in the Denial of Temporary Injunction for the Reasons Stated in my Separate Memorandum Filed Herewith),
Circuit Judge;

J. DONOHOE,
District Judge.

JOHNSEN, *Circuit Judge,* concurring specially:

I concur in the denial of an interlocutory injunction, but not however upon the ground that there exists presently no reasonable likelihood of irreparable injury to the position of any of the parties before the Court, in their claimed rights, from the actions of the Board of Educational Lands and Funds and particularly from its meeting on October 8, 1951, to consider confirmation of sales.

Thus, as to the old lease holders who have protectively constituted themselves the highest bidders in the sales made of new leases upon their lands, I think it gravely doubtful whether legally any claim of rights can at all survive to them under their old leases, once the Board has made confirmation to them of the new lease rights. I should suspect that they would encounter serious difficulties in escaping the obstacle of a contract-superseding having occurred as a matter of law. On the same basis, I am inclined to believe that such a bidder, after confirmation of the sale by the Board, would equally be left without any ground to recover the bonus which he had paid, whatever otherwise might have been his rights under his old lease.

Against these considerations, however, in relation to the litigation being attempted of the old lease rights, is the

fact that an equal measure of probable irreparable injury seems to me as likely to result to the State and the interest of the public from any present stopping of the actions of the Board, if the State should ultimately be the victor in the law suit. The tabulation of sales already held, which is before us, indicates that the time is now ripe for the obtaining of profitable competitive bids on school leases. A public psychology apparently exists that the opportunity finally has come after many years to get in on school land leases. Any checking of the Board's actions could readily affect or destroy the present bonus market, both through the lapse of time and by its popular connotation of probable or prima facie old-lease rights.

Weighing these considerations against each other, the probable injury to the public interest seems to me more weighty than that to the alleged rights of the old lease holders. It must be borne in mind also that only the fact that the old lease holders are up against the dilemma of making a choice for practical purposes subjects them to the probability of injury. If absolute rights exist under their old leases, as they claim, they can simply stand on those leases and be beyond the pale of any possible legal injury. Whatever latitude might otherwise be given by a court, in order to afford an opportunity for practical protection, this is not a matter that commands consideration where the public interest is involved. The old lease holders, for purposes of an interlocutory injunction, will have to take the self-responsibility of electing to stand nakedly on their alleged rights or of accepting the legal risk involved in any step of practical protection which they desire to take.

Assuming for present purposes the right of a federal court to consider whether the declaration of a state court that a contract is invalid, where the State itself is a party to that contract, is a matter of sound legal concept in the particular situation in relation to the property-protection clause of the Federal Constitution, the showing as to alleged rights and injury made on the application for interlocutory injunction here are not sufficiently persuasive, as against the declaration of the Nebraska Supreme Court that the leases are invalid and the equally probable injury

to the public interest, to impel me, in the hasty consideration on which the injunction request must be made to rest because of the immediately impending action of the Board, to believe that such an injunction should be issued. The right of the lease holders to any injunction will have to await further development on a final trial of the merits of the action.

HARVEY M. JOHNSEN,
Circuit Judge.

(516)

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FILED
APR 7 1952
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 619

WILLIAM PROPST, WILBUR E. COOLEY AND CARL OLSON,

Appellants,

VS.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

PETITION FOR REHEARING

JAMES J. FITZGERALD,
BRUCE K. LYON,
HENRY W. CURTIS,
WM. P. KELLEY,
Counsel for Appellants.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

CASES DISCUSSED

	Pages
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Ex Facto Young, 209 U. S. 123, 150, 155	10
Greene Auditor v. Louisville Co., 244 U. S. 499	10
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Supreme Court of the United States

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

—o—

PETITION FOR REHEARING

—o—

Comes now William Propst on behalf of himself and all holders of School Land Leases, similarly situated, plaintiff, and Wilbur E. Cooley and Carl Olson, intervenors, the petitioners in the above entitled cause No. 619, in which an order was entered by this Court on March 24,

1952, dismissing this appeal for "want of a substantial federal question," and file this, their petition for rehearing and for grounds thereof, respectfully represent:

Petitioners feel that the issue involving a "substantial federal question" was not adequately stressed in their jurisdictional statement, and that this Court failed to adequately consider this issue in that no cases were cited under the due process statement contained on pages 24 and 25 of the statement as to jurisdiction A.

May we respectfully state our position in this Petition for Rehearing as follows:

We say that the action of the Board of Educational Lands and Funds in cancelling our existing leases was depriving us of property rights without due process of law. The State Board went further and immediately began offering the land covered by our leases at public auction without any hearing or without any type of court action.

The lessees involved in this litigation were not parties in the Ebke case, or any other case in the state court. Neither the Ebke case nor any other case dealt with a situation where a lease *had been executed.* The Ebke case, and all other cases in the state court, dealt only with *who* should get the lease. Our case deals with the question of what should be done in cases where the leases *had already been executed,* and where the state had ratified the leases, collected the rents, and even collected ½ of the consideration in cases where such leases were assigned.

We say that under such circumstances, we have been deprived of claimed rights under the executed and ratified

leases without due process. The learned three judge court apparently held that we could still litigate this issue in the state courts. But the case of *Home Telephone and Telegraph Co. v. Los Angeles* held specifically that it was not necessary to exhaust the remedies in state courts before invoking the protection of the federal courts where there was a violation of rights protected by the Fourteenth Amendment.

We say simply that this court should entertain jurisdiction to determine the question of whether we do or do not have property rights under the leases which were executed, delivered and ratified. We ask this court to pass upon this issue rather than leave the determination to a state board which decided the issue.

We submit that the action of a state board has frequently been held to violate the provisions of the Fourteenth Amendment to the United States Constitution. See *Appleby v. Delaney*, 271 U. S. 403, in which Mr. Chief Justice Taft delivered the opinion and reviewed many previous decisions of the United States Supreme Court. See also *King Manufacturing Co. v. Augusta*, 277 U. S. 101, *Sultan Ry. and Timber Co. v. Department of Labor*, 277 U. S. 135.

Here was the state board, which had both constitutional and legislative authority to deal with the subject matter of school land leases. The Board was composed of the Governor, the Attorney General and other state officers. Obviously it was acting for and in behalf of the state. Its action in sweeping away our rights under existing and ratified leases was the action of the State of

Nebraska in taking away our property rights without due process of law.

At the first hearing before the District Court which involved the question of an interlocutory injunction, we briefed this question and argued the same before the Court. After the District Court took jurisdiction to hear the case upon its merits, we assumed that this question would not again be raised against us. This was evidently an erroneous assumption, and we should have cited those authorities which establish the fact that this case does present a "substantial federal question."

We ask this Court's indulgence in considering this question in the light of the following brief statement of what we conceive to be the controlling law in this matter.

This case involves actions taken by the Board of Educational Lands and Funds of the State of Nebraska which we alleged are confiscatory and violate the Fourteenth Amendment. This Board is a state administrative agency of the State of Nebraska, constituted under and by virtue of the Constitution of the State and composed, by constitutional direction, of the Governor, Attorney General, and other constitutional officers of the state. This action of the Board has to this time resulted in the cancelling of some 1,500 leases issued to farmers and ranchers of Nebraska, as we alleged, contrary to the provisions of the Fourteenth Amendment, and that leases upon the same lands have been and are being issued to other persons for which the State of Nebraska has already collected approximately four million dollars in bonus bids.

We urgently contend that this situation presents a "substantial federal question" and invite the Court's attention in support of this to the following:

The question of federal jurisdiction in cases involving action of state officials or state administrative Board contrary to the Fourteenth Amendment has been the subject of much controversy in the courts for many years. An authoritative discussion of this problem appears in 40 Harvard Law Review, page 969. This article was prepared by Samuel Shepp Isseks and, as revealed by the footnote, "had its origin in a report prepared for the course on Federal Jurisdiction conducted by Professor Felix Frankfurter at the Harvard Law School. The writer is greatly indebted to Professor Frankfurter for suggestions in connection with the problem herein discussed."

This paper was cited by Justice Frankfurter in the case of *Snowden vs. Hughes*, 321 U. S. 1, and is such a compelling and authoritative article on this question, that we feel that this court is not justified in finally disposing of this issue without carefully considering this paper.

Mr. Isseks assumes a case almost identical with the case brought to this court by this appeal. "A suit is brought in a federal district court to enjoin administrative action by a state official. There being no diversity of citizenship, federal jurisdiction is based solely on the claim that the acts sought to be enjoined are violative of the Federal Constitution." Mr. Isseks also assumes that the acts in question also violate a state cosntitution or statute. This element is not present in the instant case. At least the District Court held that the action of the Board was directed by the Supreme Court of Nebraska

and that the effect of Nebraska Supreme Court decisions was to leave the Board with the indicated obligation of putting the lands up for re-leasing at public auction.

Our case therefore is even more favorable than the case assumed by Mr. Isseks.

In his assumed statement of facts Mr. Isseks applies the case of *Barney v. City of New York,* 193 U. S. 430, in which situation the court held no federal jurisdiction existed. But, says Mr. Isseks, "the Barney case suffered a series of severe blows and the decision in *Home Tel. & Tel. Co. v. Los Angeles,* 227 U. S. 278, seemed to have administered the final quietus."

However, notwithstanding the Home Telephone case, Mr. Isseks suggests that the Barney case "has shown strong vitality, and has been applied by several federal courts within the past few years." (However, none of these recent cases are in the United States Supreme Court.)

The Barney case reaches its conclusion that no federal question is involved, because the action of the Board was not only *not* authorized, but was *forbidden* by the legislation, and hence was not action by the state within the intent and meaning of the Fourteenth Amendment. "Complainant's grievance was that the law of the state had been broken and not a grievance inflicted by action of the legislative or executive or judicial departments of the state; and the principle is that it is for the state courts to remedy acts of state officers done without authority of or contrary to state law."

Mr. Isseks, therefore, rightly reasons that, "while on its specific facts, the most that the Barney case can be said to hold is that the federal courts, in the absence of diversity of citizenship, have no jurisdiction to enjoin state administrative action claimed to be violative of the Fourteenth Amendment when the alleged state action is expressly prohibited by state law."

The obvious difference between the Barney case and the instant case is that the district court has held that the action of the Board is not prohibited by state law, but that its actions were in conformity to state law as expounded by the Nebraska Supreme Court in the Ebke and other cases. So that our grievance is one inflicted by the legislative, executive and judicial departments of the state.

In the case of *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, while the court formally adhered to the Barney case, it refused to apply the doctrine to a new situation and Mr. Justice Holmes rests his dissent on the theory that the action of the Board is not state action within the Fourteenth Amendment, he assumes that if such action is *sustained* by the Supreme Court of the state, relief may be granted by the Supreme Court of the United States on writ of error. The state would then have acted. In the instant case the district court has held that the Supreme Court of the state has sustained and actually directed the Board's action.

Mr. Isseks concludes that the Barney doctrine as a constitutional limitation barring the federal courts from enjoining state action in controversies where the state law prohibits the act alleged to violate the federal constitu-

tion, must be discarded. The Home Telephone case, decided by the Supreme Court, definitely settles that.

Mr. Isseks evidently is still convinced that the results obtained in the Barney case are, in some cases, desirable, and that such results, regardless of the Home Telephone case, can be obtained in meritorious situations by the court's discretionary powers to withhold jurisdiction, but he limits this to situations where, by the plaintiff's own showing, the act sought to be enjoined is unauthorized by state law.

It is therefore apparent that the most favorable case decided by the United States Supreme Court that could be cited against jurisdiction in the instant case is the Barney case, and the only facts therein that can even justify the result obtained are lacking in the instant case. In this case the district court has held that the action of the Board is the direct result of the Nebraska Supreme Court mandate and are therefore *authorized* by the law of Nebraska.

Under the authority of the Home Telephone case this court must assume jurisdiction, even though the action of the Board was *unauthorized* by state law, except that it might invoke its inherent discretionary power to accomplish an obvious desired result. But where, as in the instant case, the action of the Board has been authorized by the Supreme Court of the State of Nebraska, there is no precedent to deny jurisdiction from any source.

In the case of *Snowden v. Hughes,* 321 U. S. 1, Mr. Chief Justice Stone delivered the opinion, and said therein:

> "The authority of *Barney v. City of New York*, on which the Court below relied, has been so restricted by our later decisions, see *Raymond v. Chicago Traction Co.*, 207 U. S. 20; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *Iowa-Des Moines Bank v. Bennet, supra*; *United States v. Classic*, 313 U. S. 299, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action."

It is evident, therefore, that Justice Stone is not willing to depart from the Home Telephone case and reinstate the Barney case. However, Justice Frankfurter in his concurring opinion seems to follow the Barney case, and states that "neither the wisdom of its reasoning, nor its holding, has been impaired by subsequent decisions."

It would appear, therefore, that this Court has not limited the Home Telephone case so as to deny jurisdiction in these cases, even though the action of the Board is unauthorized by state law. However, in the instant case, this is not material because the action of the Board of Educational Lands and Funds is the action of the state. It is a constitutional administrative Board, composed of the constitutional officers of the state, and by direction of the constitution is empowered to lease said school land under the direction of the legislature. The action of this Board is not in defiance of any state statute, but under claimed authority of a mandate from the Supreme Court of Nebraska.

It would seem to us, therefore, that this Court cannot escape jurisdiction, even by application of the Barney theory which this Court has evidently refused to apply since the Home Telephone case.

In addition to the cases cited in this petition, we respectfully call the Court's attention to the following cases: *Ex Facto Young*, 209 U. S. 123, 150, 155; *Greene Auditor v. Louisville Co.*, 244 U. S. 499; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 363, 300; *Sterling v. Constantine*, 287 U. S. 378; *Illinois Ex rel McCollum*, 333 U. S. 203; *Shelley v. Kraemer*, 334 U. S. 1.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Petitioners' briefs, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this Petition.

It is hereby certified that the above petition is presented in good faith and not for the purpose of delaying the mandate or any further proceedings herein.

Respectfully submitted,

JAMES J. FITZGERALD,

WM. P. KELLEY,

BRUCE K. LYON,

HENRY W. CURTIS,

Counsel for Appellants.

DECISIONS PER CURIAM AND ORDERS FROM MARCH 24 THROUGH JUNE 9, 1952.

MARCH 24, 1952.

Per Curiam Decision.

No. 619. PROPST ET AL. *v.* BOARD OF EDUCATIONAL LANDS AND FUNDS OF NEBRASKA ET AL. Appeal from the United States District Court for the District of Nebraska. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *James J. Fitzgerald* for appellants. Reported below: 103 F. Supp. 457.